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In the Supreme Court of the United States

OCTOBER TERM, 1991

WILLIAM AND PATRICIA CRISMAN,
Petitioners

v.

ODECO, INC.,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In coming to summary judgment, did the Fifth Circuit weigh the evidence and thereby deny the Crismans the jury trial they are entitled to under the Jones Act?

LIST OF PARTIES

The parties to the proceedings below were: Petitioners William and Patricia Crisman, husband and wife, as plaintiffs and appellants; and Odeco, Inc., as defendant and appellee.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

WILLIAM CRISMAN and PATRICIA CRISMAN respectfully petition that a Writ of Certiorari issue to review the opinion and judgment of the Court of Appeals for the Fifth Circuit of the United States in this case entered on May 31, 1991.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit (App. A *infra*, A1-A10) is reported at 932 F.2d 413.

The opinion of the District Court (App. B, *infra*, B11-B30) is reported at 736 F.Supp. 712.

JURISDICTION

This is a Jones Act case. Judgment of the United States Court of Appeals for the Fifth Circuit was entered on May 31, 1991. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTE INVOLVED

Rule 56 of the *Federal Rules of Civil Procedure* (a full copy found at Appx. C, *infra*, C31-C33) reads, in pertinent part:

> **The [summary] judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.**

STATEMENT OF THE CASE

William and Patricia Crisman filed a Jones Act suit with a consortium claim. The defendant, Odeco, Inc., by motion for summary judgment, raised that statute's three-year limitation. The Crismans countered that the statute was tolled because of the doctrine of continuous tort. The Circuit Court held that it was necessary for Crisman to give notice and complaint of the continuous tort and his resulting occupational disease to Odeco, his employer. This was necessary to toll limitation, according to the Circuit Court. It affirmed dismissal.

REASONS FOR GRANTING THE WRIT:

> **In coming to summary judgment, the Circuit Court weighed the evidence to deny Crisman the jury trial that the Jones Act provides.**

Crisman did give notice and complaint. The Circuit opinion shows this on its face. This was made a part of Crisman's papers opposing summary judgment, his deposition.

But the Circuit Court weighed the evidence and held that it was not satisfied with the notice and complaint, that it was not weighty enough, that it was not sufficient, and, therefore, the doctrine of continuous tort to toll the limitation could not benefit him.

At 932 F.2d 414 and following, the Circuit Court declared:

> **"Crisman admitted that he knew that these problems were work-related, and by 1978 or 79 *Crisman had complained to his supervisors and co-workers about his headaches.* He did not, however, indicate that the headaches were anything extraordinary or request a transfer to another job.**
>
> * * *
>
> **"[Page 416] ... Crisman admitted in his deposition that he actually knew at the time of exposure that the paint and solvent fumes caused his physical problems and *that he had complained to his supervisors and co-workers about these substances.***
>
> **"[Page 417] We rejected this attempt [in another case to toll limitation because of the doctrine of continuous tort], as Southern Pacific had no knowledge that its actions were a continuing tort. We approvingly quoted the District Court, which had held that '[w]ithout such knowledge on**

the part of [the Railroad], there could be no contin-
uing tort." [Emphasis added.]

This is Crisman's testimony in his deposition about his complaints and notice, offered against entry of summary judgment:

Deposition Exhibit, Page 53, Line 17:

Q. And tell me in '78 or '79, what did you [Crisman] do about it when you got these headaches or what else did you get?

A. Well, . . . *I reported it to the toolpusher.* [The toolpusher reports directly to shoreside executive management. He was Crisman's boss.]

Q. Who was the toolpusher that you reported it to?

A. Whoever was the pusher at the time.

Q. Do you remember his name?

A. In '78, no, we went through a lot of toolpushers. I can't remember all of their names.

Q. And what would you have told him, if you can recall?

A. The paint was bad and we would have to do something about it, the fumes in the living quarters.

Q. And what did he tell you?

A. "Do what you can. Shut the door."

Q. Was anything done about the paint?

A. Nothing.

* * *

Deposition Exhibit, Page 110, Line 15:

Q. Did you ever tell any of your co-workers about the problems you were having in the early eighties?

A. Yes, I did.

Q. Who were some of them you were telling this to?

A. Well, the toolpusher. Buddy Merrill I think was the first toolpusher. Well, Buddy Merrill was the first toolpusher I talked to about it.

* * *

Deposition Exhibit, Page 139, Line 1:

Q. What did Troy Moore or Arthur Merrill do when you told them about it?

A. Nothing.

Q. Did they tell you anything?

A. They told me it was going to stay there.

Q. Now, you said complaints of the problem with the fumes in the living quarters were reported to the toolpushers, crane operators and safety men on board the OCEAN LEADER and OCEAN RULER. Now, can you identify any of those by name for me?

A. I'll try. Let's see. On the LEADER, it was Troy Moore and Arthur Merrill, the toolpushers.

* * *

Deposition Exhibit, Page 140, Line 14:

Q. You reported to all of these about the fumes?

A. I told them about it.

Q. Did anybody tell you anything?

A. There was no way they could stop it.

Q. So what did they do, just leave it there?

A. They left it there.

Whether this complaint is sufficient is surely a jury question. Crisman complains to his superiors, his fellow seamen, and indicates that he is having trouble in the nature of an occupational disease.

[The attitude of the Circuit Court about questions of fact on summary judgment is emphasized by another evidential aspect. The Circuit Court was considering whether Crisman's claim was barred under the discovery rule; Odeco had submitted medical forms (for the assignment of medical benefits) that bore Crisman's signature, indicating that he had some form of disease that was possibly occupational. Odeco did this to show that Crisman had notice of it. Crisman plainly testified that all he did was sign the forms; he did not fill them in; that he signed them whenever he went to the doctor, but the doctor filled them in. (Some of them were filled in with typewriter, and

nobody is contending that Crisman took a typewriter around under his arm when he went to the doctor.) Crisman testified he had no knowledge of what they contained, that he just signed them.

Obviously, this testimony creates a jury question about whether these forms were sufficient to put him on notice under the discovery rule. That was for the jury. But the Circuit court said, page 416, footnote 1:

> **"Crisman questions this evidence [of the medical forms] by asserting that although he signed the forms, he did not write the information on them. The District Court, however, reasonably charged Crisman with knowledge of the information contained on the forms."**

There was no evidential basis for the Court to "reasonably charge Crisman with knowledge of the information contained on the forms."

Conceding for the moment that this did present a factual question, it was nothing more than a jury question whether Crisman should be charged with knowledge of the information on these forms. It was for the jury to decide whether Crisman carried a typewriter to the doctor's office every time so that he could fill out the forms. (The Court found this was merely cumulative under the discovery rule, rendering the point immaterial for the purpose of this petition; but clearly material for the purpose of establishing the Circuit Court's attitude and belief that it could sit as a three-member jury to weigh the evidence under the rules set forth in the *Celotex* decision of this Court. *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986).)

But this decision only says that Crisman has to come forward with evidence, not that he has to come forward with evidence that satisfies a three-member jury sitting in

the Court of Appeals. If he comes forward with evidence sufficient to create a jury question, he is entitled to go to the jury with that question. But the Circuit Court did not see it that way.]

The Circuit Court has simply rewritten Rule 56 to say that not only must Crisman bring forth evidence sufficient to create a jury question, but that he must bring forth evidence sufficient to satisfy both jury and the Circuit Court on the factual issue.

No decision of this Court says that, and the Circuit Court's ruling is contrary to the precedent of this Court and the letter and spirit of Rule 56 itself.

It boils down to this: **Under the discovery rule, the Circuit Court bars Crisman because of knowledge of the tort and occupational disease; the Circuit Court proves this knowledge by finding "that he had complained to his supervisors and co-workers about those substances." So, under the discovery rule he is barred.**

Crisman then turns to the doctrine of repetitious tort to toll the statute, and then the Circuit Court says that the same complaints and notice that barred him under the discovery rule are not sufficient to satisfy the requirements of the doctrine of continuous tort; so, Crisman loses on that aspect, too. He cannot win for losing. His complaints are strong enough to bar him on one hand and then their supposed weakness bars him on the other.

[There is no requirement under the doctrine of repetitious tort that the plaintiff complain or give notice. The Circuit Court simply erred in its interpretation of *Emmons v. Southern Pacific Transportation*, 701 F.2d 1112 (5th Cir. 1983). (This doctrine applies in cases where employment is not even involved.)

But to violate Seventh Amendment and Jones Act rights to a jury trial is no "mere judicial error."

In the *Southern Pacific* case, a man went to work for the Railroad. He either hid or failed to reveal the fact that he had bad ankles from birth. The Railroad put him to doing work that would not injure average ankles, but it did his because they were not average. To keep the FELA from becoming a Workmen's Compensation Act, the Court held that notice and request for transfer was necessary in order to show negligence since it was not the Railroad's fault that the man was born with bad ankles. In that particular case, complaint and notice was necessary *not* to toll a limitation but to *establish* a cause of action. We tried to get this across below but to no avail.

There is not a bit of evidence in the record to show that Crisman was "born with weak ankles" so far as his immunity system is concerned. He hid nothing, nor did he fail to reveal anything because he was not born with a "weak immunity system."

But if Crisman is stuck with this erroneous legal conclusion, he had satisfied it so far as summary judgment is concerned.]

We do not present this reasoning as farcical, but it is certainly dismaying: The man complains and gives notice; so he is barred under the discovery doctrine; but his complaints and notice are not enough, according to the three-member jury, to toll the statute under the doctrine of repetitious tort.

How does a lawyer explain this reasoning to this seaman?

"You are barred on one hand because you made complaint; and you are barred on the other because you did not make complaint enough."

Justice Jackson said more than once that the law should be certain and simple enough for little people who live in little towns to understand what it says and means.

If so, how does a country lawyer explain to a country client what happened here? Seamen may not still be the wards of the Admiralty, but these people who go down to the seas in drill ships deserve more consideration than what Crisman got at the hands of The Circuit Court.

What do we tell him?: **"Bill, we asked you to come in this morning so we could explain to you what the judges held. Bill, they say you struck out twice. The first time, you struck out because you complained; the second time, because you did not complain enough. That should clearly explain things to you. So, get out of here, Bill, and just be thankful you've still got your scalp. Here, before you do, here is a copy of the Circuit Court's decision. I'm sure you will find it self-explanatory. That is what kept you from going to the jury."**

May it be remembered that this is a suit under the Jones Act. And what has this Court held about this act? As an act for the relief of seamen, the Jones Act is to be liberally construed in aid of the benevolent purpose to give protection to the seaman and those dependent upon his earnings. *Cortez v. Baltimore Insular Line,* 287 U.S. 367 (1932), at 375. And last but certainly not least:

> **"Finally, the humanitarian purpose of the FELA makes clear that Congress would not wish a railroad worker deprived of his rights when no**

policy underlying a statute of limitations is served in doing so." *Burnett v. New York Central Railway Co.*, 380 U.S. 424 (1965).

CONCLUSION

The present record is certainly not one for summary judgment, particularly in a Jones Act case. The Circuit Court has weighed the evidence against the mandate of the rule itself and against the precedent of this Court.

For this reason, the writ of *certiorari* should be granted.

Respectfully submitted,

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APPENDIX A

Appeal from the United States District Court for the Eastern District of Louisiana.

Before THORNBERRY, JOLLY, and SMITH, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

Plaintiff William Crisman suffers from loss of hearing and hypersensitivity to chemicals, allegedly because of his exposure to petroleum-based chemicals while serving on vessels owned by his employer, defendant Odeco, Inc. (Odeco). The district court held that Crisman's suit was time-barred because he either knew or should have known, long before he filed this suit that his injuries were linked to his work. 736 F.Supp. 712 (1990). Because we agree that the statute of limitations bars Crisman's suit, we affirm.

I.

Crisman alleges that he sustained a hearing loss, a chemical toxicity disorder, and respiratory injuries because he worked with petroleum-based chemicals while employed by Odeco; his wife, Patricia Crisman, asserts a claim for loss of consortium.

Crisman began to work for Odeco in 1970 as a mechanic, primarily aboard drilling rigs. During his work, Crisman was exposed to Glidden DuPont paint; he experienced headaches and a burning sensation in his respiratory passages that did not abate until he returned home. Crisman subsequently was transferred to another rig, where he was required to do welding inside the stability tanks. Crisman alleges that for six years the welding fumes

caused headaches and sinus problems that again would abate when he returned home. Crisman did not consult a physician or notify anyone at Odeco of his problems.

In 1975 or 1976, Crisman was transferred to another rig, where he again used Glidden paint. Crisman once again experienced headaches and respiratory problems, but still failed to report his medical problems to a physician or Odeco until 1979. Crisman also alleges that he was exposed to paint thinners and many other chemicals that gave off fumes, causing headaches and respiratory problems, but only when he was at work.

Crisman admitted that he knew that these problems were work-related, and by 1978 or 1979 Crisman had complained to his supervisors and co-workers about his headaches. He did not, however, indicate that the headaches were anything extraordinary or request a transfer to another job.

The records of Crisman's health insurer in 1983 list Crisman as suffering from "allergic rhinitis" and indicate that the symptoms first appeared in "1963, worse in recent times." Between 1984 and 1987, Crisman signed seventeen claims forms listing his condition as having begun in 1963. On a claim form dated September 26, 1987, and signed by Crisman, he stated that the illness resulted from his occupation, and specifically noted that the duration of his illness was over twenty years. Three other forms from the same company indicate that the disease had begun in either 1983 or 1984, still more than three years prior to the beginning of this suit. Each of these claims forms was signed by Crisman, who does not dispute the diagnosis, although he does deny having assigned 1963 as the onset of his illness.

Finally, Dr. G.D. Sagrera testified that he had told

Crisman some time before 1979 that his respiratory injuries were contact conditions caused by something that Crisman either ate or touched and that in 1976 he had told Crisman that his hearing loss was caused by heavy machinery noise. Similarly, the records of a hearing specialist show that Crisman's hearing loss was known and stable by 1979. Based upon the above facts, the district court concluded that Crisman had actual knowledge of all his injuries more than three years before he brought this case and that he knew or should have known that they were caused by his work. The court thus dismissed the suit as time-barred.

II.

[1] A cause of action under the Jones Act and general maritime law accrues when a plaintiff has had a reasonable opportunity to discover his injury, its cause, and the link between the two. *Albertson v. T.J. Stevenson & Co.*, 749 F.2d 223, 228 (5th Cir.1984). The statute of limitations under either law is three years from the date of injury. *Id.*; 46 U.S.C.App. § 763a (West Supp.1991).

[2] Crisman had both actual and constructive knowledge of his injury long before 1985. We confronted a similar case in *Albertson*. There, the plaintiff worked with toxic chemicals without a respirator. After experiencing severe headaches, he sought medical treatment for ten years. During this time his injuries gradually grew worse, until he finally filed suit twelve years after his exposure. 749 F.2d at 227.

We held that the time of injury dictated when the prescriptive period began. Although the full extent of the plaintiff's symptoms were hidden, we used the concept of notice ("storm warning") to hold that Albertson's case was

time-barred:

> It is generally accepted that a cause of action for a tort accrues when there has been an invasion of the plaintiff's legally protected interest. Ordinarily, this invasion occurs at the time that the tortious act is committed. If some injury is discernible when the tortious act occurs, the time of the event rule respecting statute of limitations applies, and the plaintiff's cause of action is deemed to have accrued. If the plaintiff later discovers that his injuries are more serious than originally thought, his cause of action *nevertheless accrues on the earlier date, the date he realized that he had sustained harm from the tortious act.*

Id. at 228-29 (citations omitted, emphasis added). We thus held that Albertson had the duty to evaluate his injury to determine if his symptoms were more serious than they first appeared:

> Application of the time of event rule, rather than the discovery rule, reflects the collective legislative and judicial judgment that a plaintiff possessing knowledge of the critical facts of his injury and its cause has the duty to comply with the applicable statute of limitations and make the defendant aware that he will pursue a claim against it. A plaintiff armed with these facts cannot argue persuasively that the time of event rule offends notions of fair play and substantial justice, *even though he is unaware of all of the facts related to his injury or its cause.*

Id. at 232 (emphasis added).

[3] Statutes of limitations are intended to protect defendants from stale claims by affording plaintiffs "what

the Legislature deems a reasonable time to present their claims," while still preventing the trial of cases impaired "by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise." *United States v. Kubrick*, 444 U.S. 111, 117, 100 S.Ct. 352, 357, 62 L.Ed.2d 259 (1979). Thus, when an event occurs that should put a plaintiff on notice to check for injury, this is sufficient to start the prescriptive period running. This is true even if the event results in only minor physical effects, *Hagerty v. L & L Marine Servs., Inc.*, 788 F.2d 315, 317 (5th Cir.), *modified on other grounds*, 797 F.2d 256 (5th Cir.1986), and applies to Jones Act cases. *Id.*

This conclusion is reinforced by *Clay v. Union Carbide Corp.*, 828 F.2d 1103 (5th Cir.1987). In that case, we confronted a plaintiff standing in very much the same posture as Crisman occupies today. We upheld the district court's grant of summary judgment in favor of the defendant, stating,

> Clay had knowledge both of his injuries and their cause while he was working on the barges.... [M]any of those ailments, difficulty breathing, bronchitis, dizziness, sinus congestion, and productive cough, are respiratory in nature and are virtually identical to Dr. Campbell's 1985 diagnosis of 'chronic respiratory complaints.' Thus, Clay possessed *or had reasonable opportunity to discover the critical facts of the injury he claims to have suffered.* Clay's deposition also reveals that he knew or had reasonable opportunity to discover the cause of his injury. *For example: Clay knew his symptoms were worse when he was around the chemicals.*

* * * * * *

> We hold, therefore, that Clay either possessed or had a reasonable opportunity to discover the critical facts of his injury and its cause by mid-1976.

Id. at 1107 (emphasis added). We reach the same result today.

Crisman attempts to avoid application of *Albertson* and *Clay* by asserting that his symptoms were completely latent, like those of the plaintiff in *Urie v. Thompson*, 337 U.S. 163, 69 S.Ct. 1018, 93 L.Ed. 1282 (1949). Unfortunately for Crisman, we agree with the district court that "Crisman's deposition is replete with testimony that indicates that he was aware or should have been aware of his illness."

Even taking Crisman's statements as true, and ignoring that he had signed insurance papers stating that his injuries had begun as early as 1963, Crisman admitted in his deposition that he actually knew *at the time of exposure* that the paint and solvent fumes caused his physical problems and that he had complained to his supervisors and coworkers about these substances. Furthermore, Crisman states in his deposition that these symptoms occurred *only* at work and disappeared when he left work for extended periods of time, a fact that we already have held should put a plaintiff on notice that he has suffered an injury. *Clay*, 828 F.2d at 1107. By the early 1980's, Crisman experienced these problems *almost every time* he went to work.

Moreover, in 1979 Crisman's physician informed him that workplace toxins might be causing his problem. Crisman's insurance forms list, alternatively, 1963 and 1984 as the date of the onset of his illness, making 1987

the latest he could have filed his suit timely.[1] All these factors were sufficient to support the district court's determination, especially considering that the burden was "on the claimant to allege and to prove that his cause of action was commenced within the three-year period."[2]

Crisman's symptoms, which occurred only at work, and which by his own admission he knew were connected to the materials he used at work, put him on notice that he had suffered a work-related injury. Because these symptoms occurred, at the latest, in 1984, the district court properly held that Crisman had actual notice of a work-related injury. Thus the cause of action certainly had lapsed well before the filing of this suit.

Unlike the plaintiff in *Urie*, Crisman knew that the workplace chemicals were causing him trouble, but simply chose not to sue until his claim had grown stale. "Once a plaintiff possesses critical facts, ... legal and medical professionals are available to give advice to an injured person concerning whether he has been legally wronged." *Dubose*

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[1] Crisman questions this evidence by asserting that although he signed the forms, he did not write the information on them. The district court, however, reasonably charged Crisman with knowledge of the information contained on the forms. Furthermore, considering the wealth of evidence arrayed against Crisman establishing that he knew he was suffering from a work-related injury, his knowledge of the information on the forms is merely cumulative.

[2] *Emmons v. Southern Pac. Transp. Co.*, 701 F.2d 1112, 1118 (5th Cir.1983) (Federal Employers' Liability Act FELA case). As for the standard used in evaluating FELA actions, to which we often look for guidance in Jones Act cases, *see, e.g., Boeing Co. v. Shipman*, 411 F.2d 365, 372 (5th Cir.1969) (en banc), Crisman correctly points out that the standard is more lenient than that which applies in the ordinary action. Unfortunately for Crisman, however, even following that more lenient standard does not help him. As shown above, facts from Crisman's own deposition establish his knowledge. In the wake of *Clay* and *Albertson*, it is certain that Crisman was on notice that he should pursue his cause of action.

v. Kansas City S. Ry., 729 F.2d 1026, 1029 (5th Cir.1984). By the early 1980's, Crisman would spend one week at work, become ill, return home for one week, and recover.[3] He may have had a valid cause of action then, but he did not pursue it. This was fatal for, once "a plaintiff should reasonably have been aware of the critical facts of injury and causation," he must bring suit. *Id.* at 1030. The district court thus did not err by failing to grant Crisman the benefit of the discovery rule.[4]

[4] Crisman alternatively asserts that even if limitations bars his suit, the continuing nature of Odeco's actions mandate that the prescriptive period should run from the time that Crisman *last* worked with paint solvents. Under the "continuing tort" theory, so long as the employer negligently or intentionally continues to inflict new harm upon the employee, that employee is not required to file suit to avoid losing a valid claim.

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[3] Crisman's employer used a standard seven-days-on/seven-days-off schedule common within the industry.

[4] Crisman also contends that even if his claim was prescribed, this was a determination for a jury, and not a judge, to make. What Crisman ignores, however, is that even looking only at evidence supporting Crisman, *see Wilkerson v. McCarthy*, 336 U.S. 53, 57, 69 S.Ct. 413, 415, 93 L.Ed. 497 (1949), this case was one appropriate for summary judgment. The district court's decision can rest squarely upon only the items submitted by Crisman. The court was not weighing the evidence, as Crisman contends, but rather evaluating a case that presented no disputed facts material to the limitations issue. While evaluating when a plaintiff reasonably was put on notice ordinarily is a factual determination, in this case there was such an overwhelming array of evidence indicating that the case was time-barred that summary judgment was appropriate. Considering that the burden was on Crisman to establish compliance with the statute of limitations, *cf. Emmons*, 701 F.2d at 1117, the district court did not usurp the jury's factfinding function by granting summary judgment.

Our opinion in *Emmons* rejects the continuing tort theory where the employer did not know of the employee's condition. In *Emmons*, the employee suffered from polio, which had weakened his ankle. The company nevertheless assigned him to brakeman duty, which stressed his ankle. Seeking to avoid the FELA prescriptive period, Emmons, like Crisman, attempted to use *Fowkes v. Pennsylvania R.R.*, 264 F.2d 397 (3d Cir.1959), as support for the continuing tort theory.

We rejected this attempt, as Southern Pacific had no knowledge that its actions were a continuing tort. We approvingly quoted the district court, which had held that "[w]ithout such knowledge on the part of [the railroad] there can be no continuing tort." *Id.* at 1121.

Crisman never alleged that he had requested a transfer to another job and never suggested that Odeco knew of his alleged physical problems. Because these were the factors that the *Fowkes* court used to toll the statute of limitations, and because the *Emmons* court indicated that these were the important factors needed to invoke the continuing tort theory, Crisman cannot utilize that theory here.[5]

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[5] In his reply brief, Crisman cites *Donaldson v. O'Connor*, 493 F.2d 507 (5th Cir.1974), as a case applying the continuing tort doctrine. That case, however, involved a mental patient who wrongfully was committed to an institution. We held that his cause of action did not accrue until he was released from prison, because "[w]hen a tort involves continuing injury, the cause of action accrues, and the limitation period begins to run, at the time the tortious conduct ceases." *Id.* at 529. *Donaldson* is a special case, however, for even though the patient knew of the cause of action earlier, he could not file his suit, as the tortfeasor physically prevented him from doing so. This case is in marked contrast to cases like Crisman's, where he could have filed the suit, but simply chose not to. We also reject Crisman's claim for aggravation of injuries. The case Crisman cites for this proposition, *Fletcher v. Union Pac. Ry.*, 621 F.2d

In short, Crisman had the burden of proving that his suit fell within the prescriptive period. Because he failed to show why he did not bring it earlier, despite his knowledge that his physical problems were caused by his work, the district court properly held that this suit was time-barred. The judgment is AFFIRMED.

Footnote 5 continued.

902 (8th Cir.1980), *cert. denied*, 449 U.S. 1110, 101 S.Ct. 918, 66 L.Ed.2d 839 (1981), involved two separate torts. The aggravation-of-injuries theory requires the employer to commit a *new*, separate tort that causes additional injuries to a plaintiff. In this case, however, Odeco did not take any new actions that it had any reason to know would harm Crisman. It simply continued to assign him to his job. Crisman does not allege that he brought his hypersensitivity to Odeco's notice, apart from a few routine complaints he made to a supervisor that sometimes the paint thinners gave him headaches. Before Crisman can invoke the aggravation of injuries rule, he must point to an underlying tort that occasioned these injuries. *Urie*, 337 U.S. at 169, 69 S.Ct. at 1024. Because he cannot, the district court did not err by dismissing the allegation of aggravation of injury.

APPENDIX B

ROBERT F. COLLINS, District Judge.

Defendant, ODECO, Inc., moves the Court for summary judgment in its favor, dismissing the claims of plaintiffs, William and Patricia Crisman, on the basis that their claims have prescribed. For the reasons given below, the Court GRANTS the motion.

I. INTRODUCTION

This matter involves personal injuries allegedly sustained by Crisman during the course of his 19 years of employment with ODECO, Inc. Crisman alleges that he has sustained: (1) a hearing loss; (2) a chemical toxicity disorder; (3) a respiratory and upper respiratory injury; and (4) fear of cancer due to exposure to toxic substances. Plaintiff, Patricia Crisman, has asserted a claim for loss of consortium.

Defendant contends that because plaintiffs knew or should have known that the alleged symptomatology was causally related to plaintiff's employment with ODECO several years prior to his filing suit, plaintiffs' claims have prescribed and, therefore, should be dismissed.

II. FACTS

Plaintiffs' claim involves detailed, yet undisputed facts. Crisman has been employed by ODECO since 1970 as a mechanic. Crisman primarily worked as a mechanic aboard drilling rigs in the Gulf of Mexico. The first rig Crisman worked aboard for ODECO was the D/B RIMTIDE in 1970. While working aboard the D/B RIMTIDE, Crisman alleges that he was exposed to Glidden Du Pont

paint (Crisman Deposition, p. 38) (herinafter "Deposition"), which caused him severe headaches, burning in his lungs, eyes, sinuses, throat and nose, and caused pressure behind his eyes (Deposition, pp. 39-41). Crisman stated that he recovered from this incident within three to four days and did not report the incident to anyone with ODECO. *Id.* Crisman specifically testified: "I thought it was the paint after that, because everybody else was having a problem with that stuff." (Deposition, p. 41) Crisman stated that he was not exposed to any other toxins aboard the D/B RIMTIDE (Deposition, pp. 42, 60).

In 1970 or 1971, Crisman was transferred to the D/B ELDORADO. Aboard the D/B ELDORADO, he stated that he did not have a problem with paint fumes but, rather, was required to work in stability tanks aboard the rig where welding was in progress. Crisman stated that whenever he worked in the stability tanks, welding smoke in the tanks caused headaches and burning in his chest and sinuses and caused a metallic taste in his mouth. These problems only occurred while he was working in the stability tanks (Deposition, pp. 43-44, 60-61). Crisman stated that the condition with his headaches and burning in his chest and sinuses would resolve when he returned home from a seven-day hitch offshore. Crisman stated that there was only one occasion he could recall when his condition did not resolve during his week off from work, and this was an occasion when he had worked in 110-degree heat in an engine room on the rig (Deposition, p. 45).

Crisman worked aboard the D/B ELDORADO from 1970 until 1976 and never reported any of these incidents to ODECO. Crisman further stated that he never sought or obtained treatment for these problems. Crisman stated that he did not consult with a physician because the

condition always resolved when he arrived home for his week off from work and usually cleared up within one day of returning home (Deposition, pp. 46-48).

In 1975 or 1976, Crisman was transferred to the D/B OCEAN LEADER where he worked as a rig mechanic until 1986 (Deposition, p. 51). Aboard the D/B OCEAN LEADER, Crisman was again allegedly exposed to Glidden Du Pont paint, and in 1978 or 1979, he began to notice the development of headaches from these paint fumes (Deposition, pp. 52-53). Crisman stated that he tried to avoid these fumes while at work, but he nevertheless experienced headaches due to paint fumes on virtually every hitch he worked during his tenure aboard the D/B OCEAN LEADER (Deposition, pp. 54, 56). Crisman did not seek treatment from any physician for this condition, because the condition always cleared up when he went home from work and when he was away from the paint fumes (Deposition, p. 55).

Also, Crisman was exposed to welding fumes in the machinery room aboard the D/B OCEAN LEADER and was exposed to oil-based muds and completion fluids which caused him headaches and caused him to generally "feel bad" (Deposition, pp. 57-58).

Crisman was also allegedly exposed to mineral spirits, paint thinners, and various solvents aboard the rigs, which caused him similar medical problems. Crisman stated that he experienced these problems only when working aboard ODECO rigs (Deposition, p. 59). Crisman noted that in 1984 or 1985, he also began to experience insomnia while aboard the D/B OCEAN LEADER (Deposition, p. 61).

In 1986, Crisman was transferred from ODECO to

work for a related company as a mechanic aboard a platform located on the Outer Continental Shelf. While working aboard a platform, Crisman was exposed to International Paint when he was required to paint a compressor in the engine room aboard that platform. Crisman stated that he had a "bad reaction" to this paint consisting of irritation in his chest and bronchial tubes. Crisman stated that this condition cleared up in approximately one week (Deposition, pp. 62-66). Crisman further noted that while working aboard platforms, he was exposed to paraffin remover, which caused severe headaches (Deposition, p. 66), as well as being exposed to triethylene glycol, which also caused headaches (Deposition, p. 67). Like his work aboard rigs with ODECO, Crisman stated that on his off time from work, he did not experience any problems as he experienced while at work (Deposition, p. 70.).

Following the summer of 1986, Crisman returned to work with ODECO aboard the D/B OCEAN LEADER. Crisman stated that when he returned to work with ODECO, paint fumes continued to cause problems for him (Deposition, p. 71). Crisman was then transferred to the D/B OCEAN RULER, where he was also exposed to paint thinner and paint fumes. These paint fumes likewise caused headaches and dizziness (Deposition, p. 72). Crisman worked one hitch in the generator room aboard the D/B OCEAN RULER where exhaust fumes caused him nasal irritation and bleeding (Deposition, p. 73). Crisman stated that these exposures to various substances resulted in his suffering from dizzy spells, memory problems, general fatigue and headaches (Deposition, pp. 73-74, 80, 111). All of these conditions were evident to Crisman by 1984, but he never told any physician prior to 1986 of the problems he experienced aboard rigs or platforms (Deposition, pp. 94, 111). Crisman admitted that this alleged illness was caused aboard rigs and that its origins were in his exposure to paint fumes

(Deposition, pp. 118, 121-122, 155-157).

Further, Crisman acknowledges that by at least 1978-1979, he complained to his supervisors and co-workers at ODECO that he suffered headaches due to his exposure to paint fumes. These complaints were made on numerous occasions (Deposition, pp. 110-111, 139-140).

That Crisman was aware he was suffering from some medical problems is well documented. The records of New York Life Insurance Company, ODECO's health insurance provider during 1983, show Crisman's knowledge of his alleged condition. Health insurance forms dated from August through December of 1983 contain a diagnosis of "allergic rhinitis" and indicate that the date symptoms appeared was "1963, worse in recent times." (New York Life Insurance Company claims forms dated August 11, 1983, October 18, 1983, October 23, 1983, October 31, 1983, November 11, 1983, November 17, 1983, November 26, 1983, December 1, 1983, December 13, 1983 and December 28, 1983, identified as Exhibit B, *in globo*). Each of these claims forms is signed by Crisman. Crisman does not dispute the 1983 diagnosis, but he denies having assigned 1963 as the onset of his illness.

Records of Provident Life and Accident Insurance Company ("Provident"), ODECO's health insurance carrier from 1984 through 1987, likewise illustrate Crisman's knowledge of his symptoms. Seventeen claims forms between the years 1984 and 1987, all of which are signed by Crisman, state that his condition began in 1963 and had become worse recently. (Health claim forms dated January 25, 1984, February 3, 1984, February 9, 1984, March 2, 1984 (two forms), March 19, 1984, March 21, 1984, April 4, 1984, May 15, 1984, June 22, 1984, September 6, 1984, September 20, 1984, January 31, 1986, August 7, 1986,

January 12, 1987, February 3, 1987 and June 22, 1987, identified as Exhibit D, *in globo*).Crisman again denies fixing 1963 as the beginning of his illness, but he does not deny that the forms indicate that his condition was getting worse.

In 1987, Pan-American Life Insurance Company became ODECO's health insurance carrier. On a claim form dated September 26, 1987 and signed by Crisman, Crisman stated that the illness resulted from his occupation and, in addition, specifically noted that the duration of his illness was over 20 years. (Health claim form dated September 26, 1987, identified as Exhibit E). In addition, three Provident claims forms indicate 1983 as the commencement of Crisman's illness, and one form identifies 1984 as the commencement of Crisman's illness. (Health claim forms dated February 1, 1986, March 17, 1987, April 27, 1987 and May 10, 1987, identified as Exhibit D, *in globo*).

Additionally, Dr. G.D. Sagrera testified that he treated Crisman between 1966 and 1979 for a variety of "allergic reactions" and upper respiratory infections. Dr. Sagrera testified that the allergies for which he treated Crisman were "contact type" conditions. Dr. Sagrera testified: "I think that was some contact type of allergy, something either that he took in internally or that he touched." (Exhibit G, p. 4)

Dr. Sagrera testified that he would have discussed with Crisman the fact that his continuing allergic-type reaction problems were environmental in nature, resulting from Crisman's exposure to reaction-causing substances (Exhibit G, p. 23). The latest time that Dr. Sagrera could have possibly discussed this situation with Crisman was in 1979, when he last treated Crisman. Accordingly, Crisman was advised, as early as 1979, by a physician that his periodic allergic-type reactions were caused by substances with which he came into contact.

With regard to Crisman's alleged hearing loss, he acknowledged that he realized he sustained a hearing loss no later than 1973 (Deposition, pp. 122-123). Further, he complained to his supervisor about noise conditions during the course of hs employment (Deposition, pp. 137-138). The medical records of Dr. Sagura[sic] show that Crisman's hearing loss was known and stable in 1979 (Exhibit E to Defendant's Motion for Summary Judgment).

Additionally, Dr. Sagrera testified concerning Crisman's auditory examination and his discussions with Crisman concerning the cause of his hearing loss. Dr. Sagrera testified that he told Crisman in 1976 that his hearing loss was caused by heavy machinery noise (Exhibit G, pp. 19-20).

Dr. Clyde E. Landrum's deposition was also taken concerning his treatment of Crisman. Dr. Landrum performed an auditory evaluation of Crisman in 1978. Dr. Landrum testified that he discussed work place noise exposure and its effect on Crisman's hearing (Exhibit H, p.13).

As this medical testimony reveals, Crisman was told by two physicians that his hearing loss, evident to Crisman by his own testimony no later than 1973 and documented by physicians in 1976 and 1978, was related to noise exposure in Crisman's work place. Crisman, therefore, has *actual knowledge* that work place noise exposure caused his hearing loss.

III. LAW

[1] The Court must resolve a common issue in a novel fact situation. It is elementary that the Jones Act prescriptive period is three years from the date a cause of action accrues. 46 U.S.C.App. § 688; *Albertson v. T.J. Stevenson & Co.*, 749 F.2d 223 (5th Cir.1984). There are, however, two

lines of Fifth Circuit precedents which are possibly applicable to the instant facts. The first line of cases involves a traumatic event and a latent manifestation of injury. The other line involves a pure latent injury which would require application of the discovery rule. On these facts, there was not a traumatic event, but there was not a purely latent manifestation. As the Court charts a course through the murky waters of the Jones Act prescriptive period, it must determine whether Crisman had adequate storm warnings to steer him to the courthouse to file his claim. *See, e.g., Jensen v. Snellings,* 841 F.2d 600 (5th Cir. 1988)(securities investors not allowed to ignore "storm warnings" of false statements and possible claim). The issue, therefore, is whether the Court should apply the discovery rule to facts which indicate that the plaintiff had knowledge of his illness without having been subjected to a traumatic event. The Court will now examine the two lines of Fifth Circuit cases dealing with this situation.

A. *Traumatic Event/Latent Manifestation*

Albertson v. T.J. Stevenson & Co., supra, provides a starting point for analysis of the traumatic event/latent manifestation line of cases. In *Albertson,* plaintiff worked as an electrician aboard an oceangoing vessel for an 18-month period ending in February of 1969. Plaintiff was allegedly injured when he used a toxic chemical, used to clean electrical equipment, undiluted and without the use of a respirator. As a result of this exposure, plaintiff experienced severe headaches on five or six occasions.

After leaving the service of the vessel, he sought medical treatment and was treated from 1969 through 1979. Throughout the course of his treatment, plaintiff's symptons became worse, and a number of additional medical problems were diagnosed. Plaintiff claimed that he was first advised of the connection between his exposure in

1969 and his illness in 1980. Plaintiff filed suit in 1981, 12 years following his claimed injurious exposure.

Defendant moved for summary judgment on the basis of prescription, which was granted by the trial court. On appeal, the Fifth Circuit held that the Time of Event Rule applied and that Albertson's cause of action accrued in 1969. Therefore, the prescriptive period began to run at the time of exposure, and Albertson's claims prescribed in 1972, nine years before he filed suit.

The Fifth Circuit described Albertson's claim as a "traumatic event/latent manifestation" case, because as a result of his exposure, Albertson had both an immediate reaction to his alleged exposure, as well as having sustained latent injuries that did not manifest themselves until much later. However, the Court held that simply because the full extent of his injuries did not manifest themselves at the time of exposure, Albertson had sufficient knowledge that he had been injured and reasonable opportunity to investigate and discover the "critical facts" of his injury, such that he *should have known* of the relationship of his injury to his exposure. As the *Albertson* court explained:

> It is generally accepted that a cause of action for a tort accrues when there has been an invasion of the plaintiff's legally protected interest. Ordinarily, this invasion occurs at the time that the tortious act is committed. If some injury is discernible when the tortious act occurs, the time of event rule respecting statutes of limitation applies, and the plaintiff's cause of action is deemed to have accrued. If the plaintiff later discovers that his injuries are more serious than originally thought, his cause of action nevertheless accrues on the earlier date, the date he realized that he had sustained harm from the tortious act.

Id. at 228-229 (citations omitted).

The Court specifically distinguished Albertson's case from a "pure latent injury" situation, where a plaintiff is injured but has no knowledge of either an injury or its relationship to his exposure. For example, where a worker sustains silicosis from occupational exposure, but has no manifestation of injury, the Time of Event Rule is inappropriate and the "Discovery Rule" is applied. The Court explained that in a pure latent injury situation, plaintiff's cause of action accrues when he discovers, or should have discovered, both the injury and its cause. *Id.* at 229-231.

To the contrary, in *Albertson*, plaintiff knew of his injury because there was the immediate manisfestation of headaches. Further, Albertson had informed his superiors aboard the vessel that he would not utilize the substance to which he was exposed for the duration of the vessel's voyage. The Court held that these facts showed sufficient knowledge of an injury to Albertson and, therefore, his cause of action accrued at that time. *Id.* at 231. The Court stated: "A plaintiff on these facts cannot argue persuasively that the time of event rule offends notions of fair play and substantial justice, even though he is unaware of all of the facts related to his injury or its cause." *Id.* at 232.

The Fifth Circuit also examined when a toxic exposure cause of action accrued in *Hagerty v. L & L Marine Service, Inc.*, 788 F.2d 315, *modified*, 797 F.2d 256 (5th Cir.1986) and *Clay v. Union Carbide Corp.*, 828 F.2d 1103 (5th Cir.1987). In *Hagerty*, plaintiff was drenched with dripolene, a chemical containing benzene, toluene, and xyolene. After his drenching, he suffered a brief period of dizziness, followed by leg cramps. The following day, he felt a stinging in his extremities. Following *Albertson*, the Court held that Hagerty's cause of action would accrue if his injury was discernible on the occasion when he was

drenched with the toxic chemical. Applying the *Albertson* rule, the Court held that dizziness, leg cramps, and a persistent stinging sensation in the feet and fingers suggested sufficient notice of harm or injury so as to fall within the rubric of a traumatic event/latent manifestation case.

In *Clay,* plaintiff was a Jones Act seaman working aboard river pushboats, which pushed river barges containing toxic chemicals, from 1969 until 1976. Plaintiff was allegedly exposed to vapors and fumes from the chemicals carried aboard these various barges. During the time of his employment, Clay suffered from a number of ailments, including laryngitis, difficulty breathing, nausea, burning eyes, headaches, bronchitis, memory loss, mental confusion, dizziness, prostate gland trouble, erratic heartbeat, sinus congestion, and a productive cough. His symptoms, however, improved when he was not working. He testified in his deposition that he did not experience any health problems when he was at home. Further, while he was working, he complained to his captain that the fumes from the chemicals made him feel ill.

In 1985, Clay consulted a physician who attributed his ailments to "prolonged exposure to irritant vapor and fumes." Suit was not filed until September 6, 1985 alleging claims under the Jones Act and general maritime law.

The Fifth Circuit held that Clay's case was of the type described in *Albertson, supra,* as traumatic event/latent manifestation, and, therefore, the Time of Event Rule for prescription applied. Plaintiff argued that the Time of Event Rule should not apply because the ailments he suffered at the time of his exposures produced only "minor physical ailments." The Court rejected plaintiff's argument, however, because Clay had knowledge of an injury and its cause while he was working for his employer. Therefore, as the Fifth Circuit held, the plaintiff:

> "... possessed or had reasonable opportunity to discover the critical facts of the injury he claims to have suffered. Clay's deposition also reveals that he knew or had reasonable opportunity to discover the cause of his injury. For example: Clay knew his symptoms were worse when he was around the chemicals ..."

828 F.2d at 1107. The Court finds that the traumatic event/latent manifestation line of cases is distinguishable from the instant facts because Crisman did not suffer a truly traumatic injury.

B. *Pure Latent Injury*

As noted above, *Albertson* defined a pure latent injury case as one in which "the plaintiff fails to discover either the injury or its cause until long after the negligent act has occurred."

The discovery rule has been analyzed by the Fifth Circuit and other federal circuits in cases involving exposure in toxic substances. In *W.T. Smith v. States Marine Intern, Inc.* 864 F.2d 410 (5th Cir.1989), the Fifth Circuit analyzed the causal prong of the discovery rule. In *Smith*, a marine engineer who worked aboard merchant vessels intermittently from 1942 until 1966, and then continuously from 1966 until his retirement in 1982, brought suit in 1987, almost five years after his last engineering job, for damage to his hearing under both the Jones Act and general maritime law. The district court granted the shipping company's motion for summary judgment on the ground that Smith's causes of action were time barred.

The Fifth Circuit reversed and remanded the case, noting that neither the historical facts of *Smith* nor the

applicable legal standards as enunciated in *Clay v. Union Carbide Corp., supra,* and *Albertson v. T.J. Stevenson, supra,* were in dispute. The Fifth Circuit summarized the issue as follows:

> "Whether Smith possessed or had a reasonable opportunity to discover the critical facts of his injury *and* its *cause* at least three years before he filed suit."

The Court added:

> "Summary Judgment could not properly be rendered, therefore, unless Smith *should* have appreciated that his hearing loss was attributable to long-term exposure to loud noises."

864 F.2d at 412.

The Court found there was no evidence in the record from which to deduce the factual predicate that Smith could have known or actually did know of the general correlation between his exposure to noise and the hearing loss he suffered.

The Sixth Circuit analyzed the time of event/discovery rule dilemma in *Hicks v. Hines, Inc.,* 826 F.2d 1543 (6th Cir.1987). In *Hicks,* plaintiff was a Jones Act seaman who worked for various barge companies from 1954 through 1967. He alleged that in the course of his work, he was exposed to various chemicals such as chlorine, caustic soda and benzene. As early as 1973, one of Hick's treating physicians asked if he worked in a chemical plant and mentioned that Hicks had chemical spots in his eye and could expect degeneration in that eye. In 1983, he was diagnosed as suffering from bladder cancer. Hicks filed suit in 1984 under the Jones Act against various barge

companies and a chemical manufacturer alleging that exposure to the chemicals caused his bladder cancer. Reasoning that Hicks knew of his eye condition as early as 1973 and that this knowledge demonstrated that he had had an obvious injury and knew its cause, the district court dismissed the case as time barred. The district court further held that the suit based on the bladder cancer was barred because it was a result of the same alleged tortious exposure to harmful chemicals.

After analyzing the *Albertson v. T.J. Stevenson Co., Inc.*, 749 F.2d 223 (5th Cir. 1984) line of cases and the *United States v. Kubrick*, 444 U.S. 111, 100 S.Ct. 352, 62 L.Ed.2d 259 (1979) line of cases, the Sixth Circuit held that the facts in *Hicks* pointed to application of the discovery rule. The Court added:

> "We recognize the difficulty which arises when a plaintiff who has suffered a legally cognizable but relatively small injury is required to sue for both existing and potential damages. This difficulty may be particularly formidable when there is only a possibility of any particular future illness, as can often occur when the potential illness is cancer (citations omitted). A plaintiff's interest in filing his suit within the relevant statute of limitations conflicts with his inability to display symptoms of a particular future illness. The defendant's interest and repose also conflicts with his exposure to claims for potential damages which may never come to pass."

826 F.2d at 1545.

The Sixth Circuit found that the district court's conclusion that Hicks was aware that he had chemical spots on his eyeballs as early as 1973 was correct. However, it was

not clear to the court that the eye doctor related Hicks' chemical exposure to the spots or that Hicks awareness of his injury provided notice tht would trigger the running of the statute of limitations.

Nevertheless, the Court affirmed the district court and held that plaintiff's blindness and his doctor's warnings gave him sufficient notice of his potential claim more than three years before the claim was filed. The Court finds that the discovery rule is not applicable here because Crisman was not totally unaware of his alleged injuries.

C. *Continuing Tort*

[2] In the alternative, plaintiff suggests that the facts and circumstances of his case point to the applicability of the "Continuing Tort Doctrine." In *Nasser v. Hudson Waterways Corp.*,563 F.Supp. 88 (W.D.Wash. 1983), the Court held that the Doctrine of Continuing Tort was applicable in Jones Act cases. In *Nasser,* the seaman alleged that he received negligent medical care. He did not file suit until three years and twenty-six days after his initial injury. The Court held that the Jones Act's statute of limitations may be tolled until the tortious conduct ceases, on the theory that one should not be allowed to acquire a right to continue tortious conduct. The Court added:

> "Where injury results from a negligent act, and the injury continues by reason of continued negligence, a recovery may be had for damages caused by the continuing negligence, although the cause of action for the original injury is time-barred."

563 F.Supp. at 90. *Nasser* is most appropriately characterized as a maintenance and cure case. In sum,

Nasser held that the statute of limitations begins to run each day that a vessel owner breaches his duty to provide maintenance and cure. Crisman has not alleged a failure to provide maintenance and cure in this case. The Court therefore finds *Nasser* and the Continuing Tort Doctrine inapplicable to this chemical exposure case. The Continuing Tort Doctrine was recently applied in *Meadows v. Union Carbide Corp.*, 710 F.Supp. 1163 (N.D.Ill.1989). In *Meadows,* plaintiff worked as a reactor operator for a chemical company. Shortly after he began working at the chemical plant, he developed a rash. Later, he began suffering from nervousness, breathing difficulties and heart palpitations. By August of the same year, he was told by a doctor that his condition was caused by chemical toxicity.

Meadows then requested a transfer from the reactor room because he believed chemicals were causing his medical problems. The request was denied. He stayed on the job and his problems continued. A few years later in 1983, he again requested transfer from the reactor room and was again denied. Suit was finally filed on August 14, 1986. The Court, applying Illinois law, held that the defendant chemical company's failure to provide a safe product and its failure to adequately warn the plaintiff of the dangers of using the product, constituted a continuing tort. Thus, plaintiff's cause of action accrued on the date when he last faced chemical exposure. *Meadows* added that although the plaintiff was well aware of the cause of his injury and could foresee the possible severity of his injury, his claim was not time barred as a matter of law. The Court put forth the following rule of law:

> "... we conclude that the limitations period does not begin to run when the plaintiff acquires knowledge that his deteriorating physical con-

> dition was or may have been caused by his use of potentially hazardous chemicals. We look instead to the date of the last exposure. To hold otherwise would allow a party to acquire a right to continue engaging in tortious conduct."

710 F.Supp. at 1166. Although *Meadows* was a chemical exposure case, it is likewise distinguishable. The *Meadows* court applied Illinois products liability law to find that the defendant's conduct constituted a continuing tort. Further, the *Meadows* plaintiff was twice denied the opportunity to transfer from the injury-causing location. Here, the Court is applying federal law provided by the Jones Act, 46 U.S.C. App. § 688. Likewise, the record does not indicate that Crisman requested a transfer. Even if the Court was convinced tht the Continuing Tort Doctrine was applicable here, it is constrained by contrary Fifth Circuit precedent. *See Emmons v. Southern Pacific Transportation Co.*, 701 F.2d 1112 (5th Cir.1983) (Under FELA, there can be no continuing tort without the employer's knowledge of the injury-causing activity).

IV. ANALYSIS OF THE INSTANT FACTS

D. *Perceptible Injury/Appreciable Manifestation*

[3] As it clearly appears that Crisman had sufficient notice of his impending problems, the Court finds that this situation is best described as a perceptible injury with appreciable manifestations. Crisman acknowledges that he had problems only aboard the rigs and that these problems occurred when he was exposed to paint fumes. Since the Jones Act incorporates by reference the Federal Employers' Liability Act's (FELA) limitations period, 45 U.S.C.§ 56, the Court looks to FELA cases for guidance on this novel issue. Under FELA, a cause of action does not

accrue until the claimant becomes aware that he has been injured and that injury is work related. *Emmons v. Southern Pacific Transportation Co.*, 701 F.2d at 1119, *citing, Urie v. Thompson*, 337 U.S. 163, 69 S.Ct. 1018, 93 L.Ed. 1282 (1949). In *Emmons*, the Fifth Circuit found that the trial court was correct in specifically focusing on the injured worker's awareness of his injury to determine whether the claim was time barred. 701 F.2d at 1120, n. 8. The trial court record showed plaintiff's testimony that he was aware of his problem and that it was work related. *Id.* Likewise, Crisman admits in his deposition that he only had problems at work and with specific substances, but he nevertheless maintains that he did not know the problems were work related. Thus, the question becomes whether Crisman should be allowed to ignore what appears to be obvious signs of trouble. This Court finds that he should not. Crisman's deposition is replete with testimony that indicates that he was aware or should have been aware of his illness. Unlike *Urie v. Thompson, supra*, where the Supreme Court refused to find that the FELA limitations period was enacted by Congress to charge innocent plaintiff with knowledge of an undetected and unnoticed injury, on these facts, the Court finds that Crisman had knowledge of both his injuries and their cause. Like the facts in *Clay*, Crisman's deposition reveals that he knew or had a reasonable opportunity to discover the cause of his injury. Although Crisman disputes that his condition began in 1963, it is undisputed that Crisman's symptoms increased in either 1983 or 1984. Using the latest date for the increase in symptoms, the Court finds that Crisman's cause of action accrued in 1984 when he noticed an increase in his long-standing problems caused by exposure to paint fumes. The prescriptive period has run, and Crisman's claims are prescribed.

V. CONCLUSION

The wealth of Fifth Circuit jurisprudence makes clear that, like *Albertson, Hagerty* and *Clay*, Crisman's cause of action, if any, accrued at the time of his alleged exposure to the "toxins." Crisman admitted in his deposition that he knew that his exposure to paint fumes caused him headaches and the other ailments from which he allegedly suffered. Crisman admitted in his deposition that he knew *at the time of exposure* that these substances caused the physical problems complained of. Crisman admitted in his deposition that he complained to his supervisors and co-workers about the effects the substances had on him. Crisman admitted in his deposition that these physical problems occurred only while he was at work and resolved when he was at home, just as in *Clay, supra,* Crisman admitted that he experienced these problems on "virtually every hitch" that he worked for ODECO (Deposition, p. 56). Further, Crisman's physician informed him that he suffered from a contact-type allergy which was aggravated by reaction causing substances. All these facts point to one conclusion: Crisman knew or should have known that the various substances caused his alleged physical problems and ailments. Crisman had actual or constructive knowledge of both the effects of his exposure and the relationship of that exposure to his claimed ailments. Therefore, Crisman had knowledge of the "critical facts" of his injury and his cause of action accrued at the time of exposure.

Although Crisman's physician informed him in 1979 that work place toxins may have caused his problems, the Court will use the latest year identified in Crisman's insurance claim forms as the onset of his illness. Thus, Crisman's cause of action accrued in 1984. At the latest, Crisman would have had to file his lawsuit by the end of 1987 in order to assert a timely claim under the Jones Act.

Crisman filed suit on September 12, 1988. These claims come too late and, therefore, must be DISMISSED.

Crisman's general maritime law claims for unseaworthiness and maintenance and cure must, likewise, be DISMISSED. Those claims are, like Crisman's Jones Act claims, subject to the three-year prescriptive period. 46 U.S.C. § 763(a). Because suit was not timely filed within the statutory limitation, those claims are time barred.

Crisman's hearing loss claim has also prescribed. Crisman readily admitted in his deposition that he was aware of his hearing loss as early as 1973 (Deposition, pp. 122-123). Further, the medical records of Dr. Sagrera clearly show that Crisman's hearing loss was known and stable in 1979 (Exhibit "E" to Defendant's Motion for Summary Judgment). Crisman admitted that he knew of the relationship between this hearing loss and his employment. Accordingly, there is no question but that Crisman's cause of action for any hearing loss accrued to him by 1973 or, at the latest, 1979. Having not filed suit until 1988, Crisman's claims have prescribed.

Patricia Crisman has asserted a claim for loss of consortium arising out of her husband's injuries. Mrs. Crisman's claims are dependent on her viability of her husband's claims. Therefore, because his claims have prescribed, so have Mrs. Crisman's. Accordingly, the claims of Mrs. Crisman must also be DISMISSED as time barred.

In sum, the Court finds that William Crisman had knowledge of his injuries because the injuries were perceptible and because the injuries were manifested in an appreciable manner. Accordingly, defendant's Motion for Summary Judgment is GRANTED and plaintiffs' claims are DISMISSED as time barred.

APPENDIX C

Rule 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability, alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the

pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affadavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order

a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Mar. 2, 1987, eff. Aug. 2, 1987.)

Supreme Court, U.S.
FILED
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NO. 91-348

In the Supreme Court of the United States

OCTOBER TERM, 1991

WILLIAM AND PATRICIA CRISMAN,
PETITIONERS

VERSUS

ODECO, INC.,
RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Submitted by:

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RESPONSE TO PETITIONERS' QUESTION PRESENTED

William and Patricia Crisman have characterized the question presented for review as follows:

> In coming to summary judgment, did the Fifth Circuit weigh the evidence and thereby deny the Crismans the jury trial they are entitled to under the Jones Act?

This question incorrectly suggests that the Fifth Circuit affirmed the granting of summary judgment in favor of ODECO, Inc. where a genuine issue of material fact existed. However, the Fifth Circuit specifically found that there was no genuine issue as to any material facts in affirming the district court's ruling. As the Fifth Circuit stated:

> Crisman also contends that even if his claim was prescribed, this was a determination for a jury, and not a judge, to make. What Crisman ignores, however, is that even looking only at evidence supporting Crisman, *see Wilkerson v. McCarthy*, 336 U.S. 53, 57, 69 S.Ct. 413, 415, 93 L.Ed. 497 (1949), this case was one appropriate for summary judgment. The district court's decision can rest squarely upon only the items submitted by Crisman. The court was not weighing the evidence, as Crisman contends, but rather evaluating a case that presented no disputed facts material to the limitations issue. While evaluating when a plaintiff reasonably was put on notice ordinarily is a factual determination, in this case there was such an overwhelming array of evidence indicating that the case was time-barred that summary judgment was appropriate. Considering that the burden was on Crisman to establish compliance with the statute of limita-

> tions, *cf. Emmons,* 701 F.2d at 1117, the district court did not usurp the jury's fact-finding function by granting summary judgment.

(*See Crisman v. ODECO, Inc.*, 932 F.2d at 417, n.4, appearing in petitioners' Appendix to Petition at A-8.) The Fifth Circuit directly addressed the issue Crisman now raises, and it is clear that the Fifth Circuit and the district court applied the proper legal standards, as both courts found there was *overwhelming* evidence supporting summary judgment. In view of the foregoing, there is no proper question presented for review.

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STATEMENT OF THE CASE

Both the district court and the Fifth Circuit relied extensively on the deposition testimony of William Crisman (hereinafter "Crisman") in ruling that his claims under the Jones Act, 46 U.S.C. §688, and the General Maritime Law (as well as his wife's claim for loss of consortium) had prescribed. Crisman's deposition testimony establishes, without a doubt, that he had actual knowledge of the critical facts of his injury and its cause many, many years prior to his filing of suit on September 8, 1988.

Crisman worked for ODECO, Inc. (hereinafter "ODECO") as a mechanic beginning in 1970. His work was primarily aboard drilling rigs in the Gulf of Mexico, and he worked seven (7) days on and was then off work for seven (7) days. While working aboard the D/B RIMTIDE in 1970, Crisman claims to have been exposed to Glidden brand paint, which caused him severe headaches, burning in his lungs, eyes, sinuses, throat and nose, and caused pressure behind his eyes. This was 18 years before Crisman filed suit. Crisman testified that it took three (3) to four (4) days for him to recover from this incident and he did not report the incident to anyone with ODECO.

Crisman was then transferred to another rig, where he performed welding within the stability tanks. Crisman testified that fumes from the welding operations caused him more headaches and sinus problems, which continued during the six (6) years he was assigned to that rig. These problems always resolved when Crisman returned home for his seven (7) days off from work. Crisman neither advised ODECO of these problems nor consulted a physician for his complaints.

In 1975 or 1976, Crisman worked on yet another rig

for ODECO, where he was again exposed to Glidden paint. Crisman again experienced persistent headaches and the respiratory problems he had previously experienced from exposure to paint. He also came in contact with other chemicals such as paint thinners, which he testified caused him problems. Crisman did not seek treatment from any physician for this condition because the condition always cleared up when he went home from work and was away from the chemicals and paint fumes. (*See Crisman v. ODECO, Inc.*, 932 F.2d at 414, appearing in petitioners' Appendix to Petition at A-1-2.) He testified:

Q. When you would go home, would the condition clear up?

A. Yeah.

Q. When you would get away from the paint, would it clear up?

A. Yes.

Q. And you were working 7 on and 7 off?

A. Yes, sir.

Q. And would this occur on every hitch just about?

A. Just about.

* * *

Q. On the OCEAN LEADER from '75 through '76, did this occur that whole time?

A. Yes.

* * *

Q. And when you would go home in '75, '76, '77, '78, all the way to '86, would these conditions diminish any and go away?

A. Yes.

Q. So it was only when you were on the rig that you were really experiencing these things?

A. Yes.

(Deposition exhibit, pp. 55-56, 59; 1R 48-49, 52)

By 1978 or 1979, Crisman made his first complaints to supervisors and co-workers about these headaches. Crisman did not request a transfer to another job or indicate that his headaches were anything extraordinary. (*See Crisman v. ODECO, Inc.*, 932 F.2d at 414, appearing in petitioners' Appendix to Petition at A-2.) In Crisman's Petition, he asserts that his complaints indicated that he was "having trouble in the nature of an occupational disease". This is clearly a misstatement of fact, as nowhere in Crisman's deposition testimony did he state that he made any complaint to anyone with ODECO other than that paint fumes gave him headaches (and that "everyone had headaches").

Crisman's health insurance records from 1983, five (5) years before suit was filed, indicate Crisman was suffering from "allergic rhinitis", and further indicate that the symptoms arose in "1963, worse in recent times". Seventeen (17) claim forms signed by Crisman between 1984 and 1987 show his condition as having arisen in 1963. On the form signed by Crisman on September 26, 1987, he stated that his illness resulted from his occupation and noted that the duration of his illness was over 20 years. (*See Crisman v. ODECO, Inc.*, 932 F.2d at 414, appearing in petitioners'

Appendix to Petition at A-2.)

One of the physicians Crisman consulted prior to 1979, Dr. G. D. Sagrera, testified that he told Crisman his respiratory injuries were "contact type" conditions. He testified: "I think that was some contact type of allergy, something either that he took in internally or that he touched."

Q. Do you have any opinion about the cause of his allergic problems?

A. I think they were basically environmental things, things that he had breathed in, as is a very common problem in this part of the country.

Q. Would you have discussed that, the causes of those allergies, with Mr. Crisman at the time of your treatment?

A. Yes.

Deposition exhibit, p. 23; 3R 551)

In his Petition, Crisman does not even raise the issue of his alleged hearing loss claim. The medical evidence clearly established that Crisman knew for a fact that he had a hearing loss and the cause of that hearing loss at least ten (10) years prior to filing suit. In 1976, Dr. Sagrera identified Crisman's hearing loss and discussed with him that its source was heavy machinery noise. Another hearing specialist consulted by Crisman, Dr. Clyde E. Landrum, discussed with Crisman in 1978 the fact that noise exposure had caused Crisman's hearing loss and that he should wear some type of hearing protection on the job. (*See Crisman v. ODECO, Inc.*, 932 F.2d at 414-415, appearing in petitioners' Appendix to Petition at A-2-3.)

SUMMARY OF ARGUMENT

The Petition For A Writ of Certiorari filed by the Crismans does not present any legal or factual basis or other good cause to support either the granting of the requested writ or the need for briefs or argument on the merits. Crisman misstates the basis for the Fifth Circuit's ruling, which affirms the dismissal of Crisman's claims, and ignores most of the facts that the Fifth Circuit relied upon. Crisman suggests that the Fifth Circuit's opinion is flawed in that it contains an irreconcilable conflict which presents a genuine issue of material fact for jury consideration. This is an artifice created by counsel, which a clear reading of the Fifth Circuit's decision reveals is not correct. There are no issues presented in the Crismans' Petition worthy of consideration by this Court. Both the district court and the Fifth Circuit applied the proper legal standard to undisputed facts in finding that the Crismans' claims have prescribed.

ARGUMENT

Crisman argues that the Fifth Circuit based its decision to uphold the granting of summary judgment on the fact that Crisman made complaints to his supervisors and co-workers that paint fumes gave him headaches during his employment with ODECO. He further alleges that the Fifth Circuit considered that those complaints, while sufficient for establishing prescription, were insufficient for establishing a "continuing tort" theory under the Jones Act. This overly simplistic view of the Fifth Circuit's consideration of this case ignores most of the evidence and totally misconstrues the Fifth Circuit's analysis.

The Fifth Circuit stated that the test to be applied in determining whether Crisman's claims had prescribed is as follows:

> A cause of action under the Jones Act and general maritime law accrues when a plaintiff has had a reasonable opportunity to discover his injury, its cause, and the link between the two. *Albertson v. T. J. Stevenson & Co.*, 749 F.2d 223, 228 (5th Cir. 1984).

(*See Crisman v. ODECO, Inc.*, 932 F.2d at 415, appearing in petitioners' Appendix to Petition at A-3.) Further, in a "traumatic event/latent manifestation" case, such as was found to exist here, the "Time of Event Rule" applies:

> It is generally accepted that a cause of action for a tort accrues when there has been an invasion of the plaintiff's legally protected interest. Ordinarily, this invasion occurs at the time the tortious act is committed. If some injury is discernible when the tortious act occurs, the Time of Event Rule respecting statutes of limitations applies, and the plaintiff's cause of action is deemed to have accrued. If the plaintiff later discovers that his injuries are more serious than originally thought, his cause of action *nevertheless accrues on the earlier date, the date he realized that he had sustained harm from the tortious act.*

(*See Crisman v. ODECO, Inc.*, 932 F.2d at 415, appearing in petitioners' Appendix to Petition at A-4)

Applying the standards established by the Fifth Circuit in *Albertson, supra; Hagerty v. L & L Marine Services, Inc.*, 788 F.2d 315, *modified*, 797 F.2d 256 (5th Cir. 1986); and *Clay v. Union Carbide Corp.*, 828 F.2d 1103 (5th Cir. 1987), the Fifth Circuit found that Crisman's claims were barred by the three-year prescriptive period because: "Crisman had both actual and constructive knowledge of his injury long before 1985." (*See Crisman v. ODECO, Inc.*, 932 F.2d

at 415, appearing in petitioners' Appendix to Petition at A-3.)

The Fifth Circuit explained:

> [W]e agree with the district court that "Crisman's deposition is replete with testimony that indicates that he was aware or should have been aware of his illness." ... Crisman admitted in his deposition that he actually knew *at the time of exposure* that the paint and solvent fumes caused his physical problems and that he had complained to his supervisors and co-workers about the substances. Furthermore, Crisman states in his deposition that these symptoms occurred *only* at work and disappeared when he left work for extended periods of time, a fact that we already have held should put a plaintiff on notice that he has suffered an injury ... By the early 1980's, Crisman experienced these problems *almost every time* he went to work .... All these factors were sufficient to support the district court's determination, especially considering that the burden was "on the claimant to allege and to prove that his cause of action was commenced within the three-year period.
>
> Crisman's symptoms, which occurred only at work, and which by his own admission he knew were connected to the materials he used at work, put him on notice that he had suffered a work-related injury.

(See *Crisman v. ODECO, Inc.*, 932 F.2d at 416, appearing in Petitioners' Appendix to Petition at A-6, A-7, emphasis in original, citations and notes omitted.)

What was determinative to the Fifth Circuit was

Crisman's knowledge — knowledge that his own deposition testimony establishes. Under the test established by the Fifth Circuit, a test which Crisman does not dispute is the proper legal standard for prescription in a Jones Act case, if an injured worker has the reasonable opportunity to discover the critical facts of his injury and its cause, he is required to file suit within three (3) years from the event causing injury. The Fifth Circuit found, based on Crisman's deposition testimony, that beyond having the opportunity to discover the critical facts of his injury and its cause, Crisman had *actual knowledge* that he was injured by the chemicals he came in contact with and knew that these injuries were related to his employment.

The only time Crisman experienced problems was when he was at work. The problems always resolved completely when he went home for his seven (7) days off. This alone supported the district court's dismissal of Crisman's claims. There was and is no question for a jury to decide. The uncontested material facts were established by Crisman's own deposition testimony.

The issue of the health insurance claims forms which Crisman raises in his Petition is nothing more than a "red herring". As Crisman admits, the Fifth Circuit found that this evidence was merely cumulative to Crisman's own deposition testimony. This Court does not have to concern itself with whether Crisman "carried a typewriter under his arm to his doctor's office", as his attorneys suggest. This does not give rise to a jury question. It does not because it raises no *genuine* issue as to any *material* fact. The Fifth Circuit found that Crisman's deposition testimony alone conclusively showed his knowledge of the critical facts of his injury and its cause. (*See Crisman v. ODECO, Inc.*, 932 F.2d at 416, appearing in petitioners' Appendix to Petition at A-7.)

Crisman next turns to his "continuing tort" theory to argue that the Fifth Circuit improperly interpreted its own decision in *Emmons v. Southern Pacific Transportation Co.*, 701 F.2d 1112 (5th Cir. 1983). This is simply incorrect. Under *Emmons*, in order to establish a "continuing tort" theory, the employee must establish that an employer negligently or intentionally continued to inflict new harm upon its injured employee. The employee must establish that the employer knew of the employee's condition and its impact on him. In *Emmons*, the "continuing tort" theory was rejected, as the employer did not have knowledge of an *injury* and Emmons never requested a transfer from his position to a position which would not further aggravate his injury.

Crisman does not allege that he ever requested a job transfer. He does not allege that he complained to ODECO that he could not perform his job as a mechanic because he was experiencing headaches. Crisman cites certain passages from his deposition to support his position, although he fails to provide this Court with the full excerpts of his testimony. For example:

> Q. And tell me, in '78 or '79, what did you do about it when you got these headaches or what else did you get?
>
> A. Well, just headaches and, you know, looking back, at the time I was just realizing headaches and I was trying to isolate the area where I would be at from the paint fumes, which at the time was impossible. To make sure all the doors were shut in the living quarters to try and keep the stuff out of the living quarters and I reported it to the toolpusher.

(Deposition exhibit, pp. 53-54)

Q. And when that started, you started realizing that in '78 or '79, did you go to a doctor?

A. No.

Q. Why not?

A. A lot of people had headaches.

(Deposition exhibit, p. 55)

These excerpts, and the excerpt recited by Crisman in his Petition, illustrate what complaints he made. Crisman complained that he had headaches from paint fumes *in the living quarters* on the rig. Crisman described this as follows: "Crisman complains to his superiors, his fellow seamen, and indicates that he is having trouble in the nature of an occupational disease." (*See* Petition at 6.) Nowhere does this appear in the facts — not in Crisman's deposition testimony, submitted by ODECO in support of its original Motion For Summary Judgment, and not by Crisman in the Affidavit he submitted in opposition to that Motion. Crisman never complained that he was suffering from an occupational disease. The only complaints he made were due to headaches he and others suffered because of paint fumes in the living quarters of the rig.

This is not evidence of a genuine issue of material fact. It is simply window dressing by his attorneys, another "red herring". Crisman did not tell anyone at ODECO what he now alleges in his Petition to this Court. There was not an improper weighing of evidence by the Fifth Circuit. *There is an absence of evidence entirely.*

This Court has established the proper standards to be utilized by a district court in considering a motion for

summary judgment. The standard is not, as Crisman alleges, whether there is "a complete absence of probative fact", but rather, whether there is a *genuine* issue of *material* fact such that resolution of that dispute should be left to trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505 (1986). There is no diapute as to what Crisman has sworn to under oath with regard to the physical complaints he allegedly suffered and when those complaints arose. There is also no question as to what complaints were made by Crisman to ODECO. This was the basis for the district court's ruling on Motion For Summary Judgment, the facts which are in evidence. Crisman's deposition testimony overwhelmingly established that his claims are time-barred. The Fifth Circuit affirmed that ruling, applying the proper legal standards and based on Crisman's own testimony. The Fifth Circuit did not, nor did it have to, "weigh the evidence". The evidence is clear.

CONCLUSION

The deposition testimony of William Crisman, taken alone, was sufficient to establish his knowledge of the critical facts of his injury and their cause many, many years before he filed suit in 1988. Week after week, year in and year out, William Crisman experienced observable maladies while at work and while coming into contact with various substances. Accepting William Crisman's testimony as true, whenever he went to work he had physical problems and when he went home all of his problems disappeared. These facts establish Crisman's knowledge years prior to his filing of suit — far more than the three (3) years permitted under the Jones Act and the General Maritime Law. The district court so found. The Fifth Circuit properly affirmed.

There is no conflict within the Fifth Circuit's decision affirming the district court. The Fifth Circuit ruled based on Crisman's deposition testimony, applying the proper legal standards. The facts here do not reveal any basis to defeat summary judgment. There is a total absence of any genuine issue of fact. There is also no conflict within the Fifth Circuit's ruling. The Petiton For A Writ of Certiorari submitted by William and Patricia Crisman should, therefore, be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the above and foregoing Brief In Opposition To Petition For Writ Of Certiorari to review a judgment of the United States Court of Appeals for the Fifth Circuit by respondent, ODECO, Inc., has been forwarded to counsel for William and Patricia Crisman, Richard Broussard and William Rutledge, Domengeaux & Wright, Post Office Box 3668, Lafayette, Louisiana 70502-3668, via the United States Postal Service, postage prepaid and properly addressed, on this 27th day of September, 1991.

MAURICE C. HERBERT, JR.
ALAN G. BRACKETT

Supreme Court, U.S.
FILED
OCT 1 1991
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(3)

No. 91-348

In The

Supreme Court of the United States

October Term, 1991

WILLIAM AND PATRICIA CRISMAN,

Petitioners,

v.

ODECO, INC.,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY TO OPPOSITION TO CERTIORARI

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54 C.J.S. *Limitation of Actions*, Sectin 169 4

ARGUMENT

Medical Forms As A Red Herring:

If the medical-forms are a red herring, they are red enough to be a good stop light, no matter how smelly. Both sight and scent give ample warning. They show the attitude of the Circuit Court as a three-member jury. And if they are irrelevant because of other findings, they are certainly relevant for that point:

These assignment-forms are the forms that every patient fills out to let the doctor and the hospital directly bill the insurance carrier. Suppose a cancer patient has the sick organ removed and then undergoes chemical therapy. Each time she goes to the doctor for chemical therapy, the receptionist presents two forms, one consenting to the nuclear chemicals, the other for assignment of benefits. Every time, she will sign the blank forms; she has no idea what is placed on them as a diagnosis, any change of diagnosis, or any etiology. It is just, "Sign here, so we can bill your insurance carrier directly."

In Crisman's case, some of them were filled out on a typewriter; yet the Circuit Court says that the District Court "reasonably charged" him with knowledge of their content.

To us, relevant or irrelevant on any substantive or procedural point, this is the most relevant thing about the entire case: that Crisman must not now merely come forward with evidence; he must come forward with evidence that makes the Circuit Court say, "Yes, we are satisfied; we sit here as a jury at the gate, in front of the

jury in the box, and find as a matter of fact that he has tolled limitation."

Continuous Tort: Why The Need For Notice And Demand For Change Of Job?

The *Emmons* case does not say that at all.

Respondent insists that we have missed the mark in our analysis of *Emmons v. Southern Pacific Transportation Co.*, 701 F.2d 1112 (5th Cir., 1983). If we have, then we should not be sanctioned; we should be disbarred. Our senility has become so severe that it has overwhelmed our mental and legal competence.

We hate to take time here for the substance of this case when our point is procedural. But Respondent insists that the proper analysis is very important. Here is the same one we set forth below, more extended than in our petition:

Emmons had weak or bad ankles either from birth or from a bout of polio. He had bad ankles at the time that he applied to the railroad for a job. He either hid or failed to reveal the fact, either intentionally or unintentionally. The road set him to doing average work that would not harm average ankles. But his were not average, and his were harmed by the work. If his ankles had been average, there would have been no harm. The road, in effect, replied, *Well, gee, we wouldn't have done this to this man. If he had only let us know about his weak ankles, we would not have put him to doing work that would hurt them. We thought he had average ankles; so, we put him to doing average work that any average ankles could stand. If you hold us liable on*

these facts then you are changing the FELA into a compensation act, pure and simple, not a damage suit based on negligence.

Emmons made no claim, as Folkes did, that, "The work given me would ruin the ankles of a normal man; *it was too heavy for normal ankles,* and it certainly ruined mine because they were weak to begin with." Emmons' plea and proof as to his second cause of action was that the railroad negligently assigned him to normal work, normal stress, when he was abnormal. The road said, "We didn't know it; he didn't say anything about it." The Circuit Court, in concluding that Emmons' evidence was not sufficient to send his second cause of action to the jury plainly held, at 701 F.2d 1120:

> "The issue of Southern Pacific's negligence was submitted to the jury on two grounds: [The first ground was held to have been barred by limitation as a single, isolated tort]; second, that it was negligent in allowing Emmons' assignment as a brakeman to continue when it knew or should have known that Emmons' preexisting polio condition would worsen. * * * As to the second ground [for cause of action, not for tolling of limitation], there is no evidence that Southern Pacific knew or should have known that Emmons' work as a brakeman caused or would have caused his preexisting condition to worsen."

So, the second cause of action fails not because of time limitation but because Emmons kept his bad ankles to himself: did not give the road notice, nor complaint, nor request for transfer. Since Emmons had no cause of action

on "the second ground," there was no reason to discuss its limitation; the cause did not exist.

But in *Fowkes,* the railroad hand was a jackhammer; bad jackhammers made his good shoulders bad because of continuing use. There was nothing to indicate that he would have to give notice or demand transfer.

The doctrine of continuous tort to toll limitation cuts across the entire spectrum of tortious conduct. It applies in cases where the relation of master and servant or principal and agent is not even involved; it applies in cases of adjoining neighbors; of hazardous chemicals escaping; of pollution of fluids of any type, air or water; in case of seepage of oil or chemicals: notice and demand are not required. 54 C.J.S. *Limitation of Actions,* Section 174, p.141; see also, Section 169, *et seq.*, p.127 *et seq.*

So, the *Emmons* holding is not that there was no continuing tort, *but no tort at all,* so far as the second cause of action was concerned, because it would turn the FELA into a compensation act to say that a cause existed. But if Emmons had had *normal* ankles, and the road had negligently overloaded them, the doctrine of continuing tort to bar limitation would apply.

One thing we know for sure: The respondent here is not saying that Emmons should have recovered on his second alleged cause of action if it had not been barred by time. It would be saying the same thing as the road, *He did not prove a second cause of action; so, there is nothing to talk about barring by limitation.*

Odeco can use dramatic language, such as "overwhelming" and "actual knowledge," "no genuine issue."

But the FELA and Jones Act are clear: A jury question exists unless there is a complete absence of evidence on the point. There is sufficient evidence, to say the least, to send Crisman's claim, that limitation was tolled by the continuing tort, to the jury.

Again, *Emmons* counted on two theories: His first alleged cause was that he should have been given a pre-employment physical; the Circuit Court held that the failure to give him the pre-employment physical was single tort, not a continuing tort, and was outside the period of limitation, and that there was nothing to invoke tolling under the discovery rule. The Circuit Court then examined the second alleged cause of action, that the road had knowingly worked a man with bad ankles when it knew or should have known that he had bad ankles, and simply found that there was no evidence to support the cause of action; and, therefore, there was no need to talk about limitation (page 1121):

> While it is undisputed that Southern Pacific's assignment of Emmons as a brakeman continued until his termination, there is no evidence that Southern Pacific was aware of Emmons's ankle problem until just before he was fired. Although there is some evidence that Emmons inquired about the possibility of a transfer with a Southern Pacific official, Emmons did not seriously pursue it or make an application, nor, more importantly, did he tell the official that the reason for seeking a transfer was that his duties as a brakeman were aggravating his ankle problem. We hold therefore that there is insufficient

evidence of negligence on the part of Southern Pacific in this regard.

But *Emmons* was after full trial.

CONCLUSION

Crisman is entitled to go to the jury under the theory of tolling because of continuing tort. The Circuit Court has simply cast the Seventh Amendment aside. Review should be granted.

Respectfully submitted,

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